Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

INTERIM ORDER MO-4216-I

Appeal MA20-00246

Corporation of the City of Belleville

June 22, 2022

Summary: The City of Belleville (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to records relating to any plans for development or changes to a specified city block. The city issued a decision disclosing one email record. The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario, because she believed that additional records responsive to her request should exist. In this order, the adjudicator finds that the City of Belleville has failed to demonstrate that it conducted a reasonable search for responsive records and orders further searches.

Statutes Considered: The *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17.

OVERVIEW:

[1] This order determines whether the City of Belleville (the city) conducted a reasonable search for records. The city received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Corporation of the City of Belleville (the city) for "all records" from 2009 to the date of the request relating to "any and all plans for development or changes" regarding a specified block located in the city.

[2] The city conducted a search for responsive records and located one record. The city issued an access decision to the appellant disclosing the one email record it located.

[3] The appellant filed an appeal with the Information and Privacy Commissioner of Ontario (IPC) claiming that the city's search should have located additional responsive records. The appellant also took the position that the city unilaterally narrowed the scope of her request as its access decision did not refer to the exact wording set out in her request.

[4] A mediator was appointed to explore settlement with the parties. During mediation, the city provided a copy of a memorandum it sent to its staff directing them to search for responsive records. The memorandum identified the records using the exact wording set out in the appellant's request. A copy of the memorandum was provided to the appellant and the issue related to the scope of the request was removed from the scope of appeal. However, the appellant remained unsatisfied with the city's explanation as to why only one record was located.

[5] As mediation did not resolve the appeal, the file was transferred to the adjudication stage of the appeal process in which an adjudicator may conduct an inquiry. During the inquiry, the parties submitted representations, reply representations and sur-reply representations.[1] The non-confidential portions of the parties' representations were exchanged in accordance with the IPC's confidentiality criteria set out in *Practice Direction 7*.

[6] Both of the parties spend considerable time in their representations setting out the background of the request. The city says that the appellant filed a civil suit against it along with making complaints to licensing boards against city employees. The city submits that "[t]housands of pages of documents have already been disclosed to [the appellant] in the course of her litigation with the city." The city also says that it believes that the appellant's "multiple requests for documents that are already in her possession demonstrate a persistent pattern of vexatious conduct that constitutes an abuse of process." However, the city later clarified that is not claiming that the appellant's request was frivolous or vexatious as contemplated by section 4(1)(b),[2] and I confirm that this issue is not before me in this appeal.

[7] The appellant says that the background information the city provided in its representations seeks to portray her in a negative light. The appellant questions whether the same lawyers who defended the city's position in the litigation should be allowed to provide representations to the IPC in this matter. The appellant does not

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[1] After reviewing the city's representations, dated February 19, 2021, I requested additional information from the city about its search efforts. The city answered my questions by responding by email and provided an affidavit on March 23, 2021, which will be referred to as the city's supplemental representations.

[2] Section 4(1)(b) of the *Act* states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

dispute that she has received many documents as a result of the litigation but asserts that the present request does not seek access to records already provided to her during the litigation.

[8] I have considered the concerns raised by the parties in their representations. I have decided that any background information provided by either party related to the litigation matter, other complaints filed by the appellant or previous access requests under the *Act* will not be considered by me except to the extent that it may be relevant to the search issue before me. I also see no issue with the city's legal counsel providing representation to the city in the civil matter and the appeal before me.

[9] In addition, I note that past IPC orders have held that disclosure of a record under the *Act* is essentially "disclosure to the world" which means that no conditions can be placed on the requester's use of the record. This is quite different from being provided documents through a litigation process which may come with conditions and/or undertakings regarding the use of the documents. Accordingly, the appellant is entitled to seek access to records under the *Act* even if they have been already provided to her outside the *Act*.

[10] In this order, I find that the has city failed to demonstrate that it conducted a reasonable search for responsive records, and I order it to conduct further searches.

DISCUSSION:

[11] The sole issue in this appeal is whether the city conducted a reasonable search in response to the appellant's request. The appellant's January 2020 request sought access to:

> For the period 2009 to the present, please provide a copy of all records, plans, emails, minutes of meetings and any other documents available regarding any and all plans for development or changes to the [name] block framed by [name] Street on the west side, [name] Street on the north side, [name] Street on the east side and [name] Street West on the south side.

[12] The city explains that it did not contact the appellant to clarify the request because:

> The boundary identified in the request represents one City block, the location of which is well known to City staff. The requester's litigation with the City involves development issues related to [the] use she can make of her property. Therefore, it appeared clear to City staff that the requester was looking for information relating to the development of other properties on the same block where her property is located.

[13] The city says that its search located one email record which it disclosed in full to the appellant along with its access decision, dated July 14, 2020.[3] The email record disclosed to the appellant, attached to the city's July 14, 2020 access decision, is an email, dated May 13, 2013, sent to city staff, the mayor and council by the city's green program coordinator about a community gardens project and neighbourhood information session to be held.

[14] In its representations, the city states that the location of the city block in question was developed "some 200 years ago and has changed little over the years." The city submits that, within that one block radius, it was unable to locate any documents relating to any plans for development or changes save and except for the one that has been disclosed.

[15] The city takes the position that its search for responsive records was reasonable and in support provided a memorandum it sent to various city departments upon the city's receipt of the request.[4] This is the same memorandum the city provided to the appellant during mediation. The memorandum directs staff to conduct searches to locate records that would respond to the request. The exact wording of the appellant's request is set out in the memorandum and staff are directed to prepare a response providing the details of their search, including the following information: who conducted the search; what places were searched; who was contacted in the course of the search; what types of files were searched; if applicable, what key-words were used; and what were the results of the search.

[16] The city provided the written responses it received from each department with its supplemental representations. However, copies of responses were not provided to the appellant for confidentiality reasons raised by the city. I have summarized the responses below without disclosing the information the city identified as giving rise to its confidentiality concerns. The city submits that the following type of records in the specified locations were searched:

- Minutes of City Council, Minutes of Planning Advisory Committee in Corporate Services, but no records were located,

- Hard copy and electronic files in the offices of the Mayor and Chief Administrative Officer (CAO), but no additional records were located other than previously located,

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[3] The city initially wrote to the appellant on January 17, 2020 to confirm its receipt of her request. The city subsequently wrote to the appellant on February 13, 2020 notifying her that it has extended the time for responding to her request to March 17, 2020. I was not able to ascertain why the city did not issue its access decision until July 14, 2020 and there is no appeal of it before me.

[4] The memorandum was sent to individuals in the following departments: Corporate Services, CAO's office (includes the Mayor's office), Finance, Engineering & Development Services, Transportation/ Operations, Environmental Services, Recreation, Culture & Community Services, and Fire & Emergency Services. As mentioned earlier in this order, a copy of the memorandum was provided to the appellant during mediation.

- Hard copy and electronic files, file indexes, bookshelves and email folders in the Building, Approvals, Planning and Engineering departments, which located a specified numbered file related to the appellant's property, including Ontario Municipal Board documents, emails and documents related to an "ongoing legal proceeding,"

- Emails and archived files in the Recreation, Culture & Community Services departments, but no records were located,

- Hard copy and electronic files in the Fire & Emergency Services department, but no responsive records located except a folder concerning the appellant's property. The city notes that its lawyers also have a copy of this folder,

- Hard copy and electronic files in the Finance Department, but no records were located; and

- Hard copy and electronic files, including emails in the Transportation/ Operations, Environmental Services department, but no records located.

[17] The appellant takes the position that additional records should exist and questions whether the keywords "development" and "development issues" were used to locate records. The appellant questions whether the record holdings of the former Manager of Approvals (now retired) and another retired individual from the Building Department were searched.

[18] The appellant also questions why the city's search results do not identify records that were provided to her in the litigation or any records disclosed to her in response to a previous access request under the *Act*.

[19] Finally, the appellant says that three property owners, two of whom own properties on the block in question, told her that they saw information either in a newspaper article or on the city's website in 2020 that indicated that the "entire block was scheduled for development as a rent-to-income project."

[20] In its reply representations, the city provided the following explanation as to why its access decision did not identify documents previously provided to the appellant:

> … as stated in the City's earlier representations, the appellant has already received 1598 pages of documents, unredacted, in the litigation she commenced against the City. Indices were provided for all of these documents. The appellant has also made multiple requests through the *MFIPPA* process for the same, or similar records (including six in 2020). Given the volume of documents the City has now disclosed pursuant to the litigation, the City does not resend each of these documents. If the City did resend these documents each time, it would be required to issue a fee estimate and the appellant would be required to pay for reproducing

> material she already has. All documents dealing with other properties that would not have been captured through the litigation process have been disclosed, unless the City believed that an exception applied.

[21] The appellant responded, as follows:

> I have requested documents that had not been released and should have been. Whether there are a total of 10,000 documents released in the litigation or none, it is irrelevant to the fact that there are documents that they persist in not releasing, using endless numbers of irrelevant excuses. When they finally released the documents in their response to my 2016 requests, virtually all of the documents they released had not been released in the litigation and yet were extremely important to my case and damaging to theirs.
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> Similarly in 2019 and 2020, documents have been released that should have been released in response to my 2016 requests and definitely in the litigation, but were not.
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> The City moves from one excuse to another and never addresses the fact that they do not release all documents when requested, or even answer your questions, but instead conjure up one new issue after another.

Decision and analysis

[22] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.[5] If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[23] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[6] In this matter, the appellant says that other property owners told her that there was talk that the block in question was scheduled for re-development. In the addition, the appellant questions whether the key words used to locate electronic records were sufficient and raises a concern that she was not provided with confirmation that the record holdings of retired staff members were included in the city's search.

[24] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show

[5] Orders P-85, P-221 and PO-1954-I.
[6] Order MO-2246.

that it has made a reasonable effort to identify and locate responsive records;[7] that is, records that are "reasonably related" to the request.[8]

[25] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[9] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[10]

[26] In support of its position that a reasonable search took place, the city provided copies of the responses it received from the various departments directed to conduct searches in response to the request.

[27] I have viewed the responses, along with the city's representations, and am satisfied that the searches were conducted by experienced staff members knowledgeable in the subject matter of the request. However, although the search conducted by the city was extensive in terms of the number of departments and individuals involved, I am not satisfied that a reasonable search took place for the following reasons.

The inconsistent use of search terms

[28] The city's memorandum directing staff to conduct a search did not direct recipients to use specified search terms. There is no rule requiring that, in co-ordinating a search, search terms be identified. However, the lack of consistent search terms can provide inconsistent results, and this is what appears to have happened here.

[29] Based on my review of the information before me, the search methodology used varied greatly from department to department. For instance, there is variation between the departments as to how many street names or addresses were used to identify the city block in question. Some departments limited the search to just street names and/or addresses while others also included some of the following terms: development, non-conforming, non-compliance, duplex, second unit, converted dwelling, semi-detached, and planning. Curiously, the Engineering department reported that "no files were searched" given its view that the request did not seek access to information regarding a specific road, road allowance or capital project in which that department was involved. The Fire & Emergency Services department's response indicated that two hours of search time was expended to review paper and electronic files, but that no "searches using key words" were conducted. The Fire & Emergency Services department indicates that it "repeated" the search conducted related to one of the appellant's previous requests and no records were located, other than a file "currently involved with legal

[7] Orders P-624 and PO-2559.
[8] Order PO-2554.
[9] Orders M-909, PO-2469 and PO-2592.
[10] Order MO-2185.

issues."

[30] Though I acknowledge that it was helpful for the city to direct staff to provide a written response outlining each area's search efforts, I am not satisfied that the city made a reasonable effort to identity and locate responsive records within the city's custody or control given the inconsistent use of search terms.

The city acknowledges that additional responsive records were located but not identified in its access decision

[31] Earlier in this decision, I said that the appellant is entitled to seek access to records under the *Act* even if they have been already provided to her outside the *Act*. The city takes the position that 1598 pages of documents were provided to the appellant as a result of litigation and that indexes were provided to the appellant with the production of these documents. The city says that it has also disclosed records under the *Act* it describes as being "the same, or similar" to the documents it provided the appellant in the litigation. The city explains that when it processed the appellant's request, it decided against resending all of the responsive records to avoid requiring the appellant to pay a fee to reproduce records already in her possession.[11]

[32] The city states that "[a]ll documents dealing with other properties that would not have been captured through the litigation process have been disclosed, unless the City believed that an exception applied." However, the city did not identify these records in the context of responding to the request under the *Act* that is before me in this appeal. Nor did the city take the position that the request for access was frivolous or vexatious under section 4(1)(b), which (if established) would have permitted the city to refuse to process the request.

[33] Accordingly, the city is obligated under the *Act* to locate and identify records that are responsive to a request, regardless of whether an exemption under the *Act* applies or the record was previously provided to the appellant.

[34] In addition, I reviewed the one record the city located as a result of its search and am of the view that this record itself suggests that additional responsive records may exist, but have not yet been located by the city's searches. As noted above, the May 13, 2013 email sent to city staff, the mayor and council informed them about a community gardens project and neighbourhood information session to be held. The email also says that residents will have an opportunity to apply to be included in a lottery to win a garden plot. However, the city's access decision did not locate any other records relating to the gardens project, the information session or this lottery. Though the *Act* does not require the institution to prove with certainty that further records do not exist, I am not satisfied with the city's evidence that it made a reasonable effort to

[11] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters pay the prescribed fees associated with processing a request unless it is fair and equitable that they not do so.

identify and locate responsive records.

Summary

[35] I find that the city's search for responsive records was not reasonable in the circumstances.

[36] Accordingly, I order the city to conduct a further search for responsive records that would direct individuals in the various departments to use the search terms specified in the order provisions below to locate responsive records in its electronic and paper record holdings, including email records. In addition, the city's further search must identify records which respond to the present request but were not identified in its July 14, 2020 access decision to the appellant.

ORDER:

1. I order the city to conduct a further search for records responsive to the appellant's request filed under the *Act*, using, at a minimum, the following search terms: development(s), development issue(s), change(s), project(s), planning, land use, non-conforming, non-compliance, duplex, second unit, converted dwelling, and semi-detached, along with the street names stated in the request to identify a specified city block.

2. I order the city to issue an access decision to the appellant regarding any records located as a result of the search(es) ordered in order provision 1, including those identified by city departments through past searches in accordance with the *Act*, treating the date of this order as the date of the request for administrative purposes.

3. I order the city to provide me with an affidavit sworn by the individual(s) who coordinated or conducted the searches by **July 28, 2022**, describing its search efforts. At a minimum, the affidavits should include the following information:

    a. The names and positions of the individuals who conducted the searches;

    b. Information about the types of files searched, the nature and location of the searches, and the steps taken in conducting the searches;

    c. The results of the search; and

    d. Details of whether additional records could have been destroyed, including information about record maintenance policies, practices and retention schedules.

The city's affidavit(s) and any accompanying representations may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in the IPC's Practice Direction Number 7, which is available on the IPC's website. The city should indicate whether it consents to the sharing of its representations and affidavits with the appellant.

4. I remain seized of this appeal in order to deal with any outstanding issues arising from order provisions 1 and 3.

5. I reserve the right to require the city to provide me with a copy of the access decision referred to in order provision 2.

Original Signed by: June 22, 2022

Jennifer James
Adjudicator